

April 21, 2017

## FREEDOM OF INFORMATION ACT REQUEST

Via FOIA Online and email to: [hq.foia@epa.gov](mailto:hq.foia@epa.gov), [r9foia@epa.gov](mailto:r9foia@epa.gov), [r10foia@epa.gov](mailto:r10foia@epa.gov)

Freedom of Information Officer  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW (2822T)  
Washington, DC 20460

Regional Freedom of Information Officer  
EPA Pacific Southwest (Region 9)  
75 Hawthorne Street  
San Francisco, CA 94105

Regional Freedom of Information Officer  
EPA Pacific Northwest (Region 10)  
1200 6<sup>th</sup> Avenue  
Seattle, WA 98101

### **Re: Concentrated Animal Feeding Operation Records**

Dear EPA FOIA Officer:

This is a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, submitted on behalf of Food & Water Watch (FWW), Friends of Toppenish Creek (FOTC), Puget Soundkeeper, Columbia Riverkeeper, Association of Irrigated Residents (AIR), and the Environmental Integrity Project (EIP) (collectively, "the Requesters"). This request seeks specific documents regarding facilities defined as concentrated animal feeding operations (CAFOs), pursuant to 40 C.F.R. § 122.23(b)(2), in Washington, Oregon, and California.

The Requesters and their members have a strong interest in information related to the federal government's activities to oversee these states' Clean Water Act (CWA) national pollutant discharge elimination system (NPDES) permit programs for CAFOs, as well as the Environmental Protection Agency's (EPA) own investigatory and enforcement activities related to CAFO water, groundwater, and air pollution.

- FWW is a national, non-profit, membership organization dedicated to healthy food and clean water for all. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to stand up to corporations that put profits before people, and advocate for a democracy that improves people's lives and protects our environment. Industrial livestock pollution is one of FWW's priority issues, and it is engaged in several campaigns to reduce CAFO pollution nationally through stronger regulation, transparency, and enforcement, as well as work specifically focused on reducing CAFO pollution in California, Oregon, and Washington.
- FOTC is dedicated to protecting the rights of rural communities and improving oversight

of industrial agriculture. FOTC operates under the simple principle that all people deserve clean air, clean water and protection from abuse that results when profit is favored over people. Its work is focused on improving oversight of CAFO pollution in Washington State, using public education, citizen investigations, research, legislation, special events, and direct action. FOTC is a party to a challenge to Washington's CAFO General NPDES Permit that is currently underway.

- Puget Soundkeeper's mission is to protect and preserve the waters of Puget Sound. CAFO pollution is one of Puget Soundkeeper's priority issues, and Puget Soundkeeper is also party to the challenge to Washington's CAFO General Permit.
- AIR is a community organization based in California's Central Valley, and is focused on holding large dairies and other CAFOs accountable for their pollution.
- Columbia Riverkeeper works to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. Their work in Oregon includes a multi-faceted campaign to close CAFO pollution loopholes by working to strengthen NPDES permits, reduce CAFO air emissions, and educate the public about CAFOs and their pollution impacts in Oregon.
- EIP is a national, nonpartisan watchdog organization that advocates for effective enforcement of environmental laws. EIP has worked to improve EPA oversight of CAFO water and air pollution since its founding in 2002, and continues to prioritize increased EPA transparency and effective regulation of CAFOs at the federal and state level.

### **Records Requested**

Pursuant to FOIA, the Requesters request copies of any and all documents, records and communications of any kind, including but not limited to e-mails, interoffice memoranda, and notes, (hereinafter records) relating to CAFOs in California, Oregon, and Washington. The Requesters specifically request the following:

- All NPDES permits, including Nutrient Management Plans, currently in effect for CAFOs in California, Oregon, and Washington that are in EPA's possession;
- All EPA requests to CAFOs in California, Oregon, and Washington for information, made pursuant to EPA's CWA Section 308 authority, 33 U.S.C. § 1318, all related communications, and all records received by EPA in response, from January 1, 2013 to the present;
- All records related to EPA inspections of CAFOs in California, Oregon, and Washington from January 1, 2013 to the present; and
- All EPA warning letters, administrative orders, consent decrees, and other records related to EPA investigation of, and enforcement actions in response to, potential or alleged violations of federal pollution control laws by CAFOs in California, Oregon, and Washington, from January 1, 2013 to the present.

This request applies to all such records in any form, including (without limit) correspondence sent or received, memoranda, notes, telephone conversation notes, maps, analyses, agreements, contracts, e-mail messages, and electronic files the release of which is not expressly prohibited by law. It also covers any non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement, include any information not contained in the

original record. Additionally, this request is not meant to be exclusive of other records that, though not specifically requested, would have a reasonable relationship to the subject matter of this request. This request does not include any records that EPA currently maintains on its website.

To save resources and mailing expense, we request electronic copies of these documents whenever available. In addition, rather than waiting until all requested records have been assembled for the time period requested, the Requesters ask that you disclose responsive records as they become available to you.

### **Claims of Exemption from Disclosure**

If you regard any requested records or portions of records as exempt from disclosure under FOIA, the Requesters ask that you please exercise your discretion to disclose them nonetheless. After careful review for the purpose of determining whether any of the information is exempt from disclosure, please provide any reasonably segregable non-exempt portions of exempt records, as required by FOIA. Should you elect to invoke an exemption to FOIA, please provide the required full or partial denial letter and sufficient information to appeal the denial.

In accordance with the minimum requirements of your due process, this information should include:

- 1) Basic factual information, including the author, origin, date, length, and address of withheld records or portions of records; and
- 2) Explanations and justifications for denial, including identification of the exemption(s) applicable to the withheld information and explanations of how each exemption applies to each withheld record or portion of a record.

### **Fee Waiver Request**

The Requesters request that you waive any applicable fees for this request because disclosure is clearly in the public interest. As described below, disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure, and the fee waiver was designed specifically to allow nonprofit, public interest groups, such as the Requesters, access to government documents without the payment of fees. The statute is to be liberally construed in favor of waivers for noncommercial requesters. *See Judicial Watch v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it is ‘liberally construed in favor of waivers for noncommercial requesters’”). As explained below, the Requesters satisfy the criteria for a fee waiver established in FOIA, described as a multi-factor test in EPA’s implementing regulations, 40 C.F.R. § 2.107(l).

**Requirement 1: Disclosure is likely to contribute significantly to public understanding of the operations or activities of the government**

*Factor 1: The subject matter of the requested documents concerns operations or activities of the federal government*

The Requesters seek EPA records related to CAFOs, EPA's oversight of CAFO pollution, and EPA's oversight of California's, Oregon's, and Washington's CAFO regulatory programs. EPA delegates the authority to implement the NPDES permit program to most states, including California, Oregon, and Washington, but maintains an important oversight role that includes authority to request information, conduct investigations, and take enforcement actions. As this request relates to these EPA operations and activities, the information requested clearly "concerns the operations and activities of the federal government," and therefore satisfies the first fee waiver criterion. 40 C.F.R. § 2.107(l)(2)(i).

*Factor 2: The disclosure is "likely to contribute" to understanding of federal government operations or activities*

Disclosure is "likely to contribute" to an understanding of EPA's operations or activities, 40 C.F.R. § 2.107(l)(2)(ii), because it will shed light on what information EPA has about CAFOs and CAFO pollution, and on what activities EPA has recently undertaken to ensure that California, Oregon, and Washington are adequately regulating CAFO pollution, to independently investigate CAFO pollution and compliance with NPDES permits, and to take independent enforcement action against CAFOs when necessary. The records requested will be "meaningfully informative," *id.*, of EPA's activities because the information is not "already . . . in the public domain, in either a duplicative or a substantially identical form." *Id.* Specific and comprehensive information about EPA's CAFO oversight activities in California, Oregon, and Washington is not currently publicly available. Such information will allow the Requesters and the public to better understand the extent of EPA's actions to carry out its duties under the CWA and other federal laws, including its independent enforcement authority and its responsibility to ensure that delegated agencies in California, Oregon, and Washington adequately implementing delegated programs as they apply to CAFOs. The requested information is critical to gaining an understanding of these EPA operations and activities.

*Factor 3: The disclosure will contribute to "public understanding" of EPA's operations and activities*

The disclosure will contribute to "public understanding" of the subject of the request because it will contribute to the understanding of a "reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester." 40 C.F.R. § 2.107(l)(2)(iii). *See also Carney v. U.S. Dept. of Justice*, 19 F.3d 807, 815 (2d Cir. 1994) (in determining whether the disclosure of requested information will contribute significantly to public understanding, a guiding test is "whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject.").

The Requesters will effectively disseminate the records and otherwise make the records and information in the records accessible and available to a broad audience of interested persons.

They will do so in ways that effectively contribute to the public's understanding. FWW is a membership organization with a staff of approximately 100, including researchers, organizers, attorneys, and communications professionals. FWW has scientific and legal expertise and our staff regularly analyze data, including FOIA records, and use this information to write, speak, and advocate to the media and the public on environmental issues. FWW frequently uses FOIA records and other public data to draft and issue policy-based reports related to CAFOs, water pollution, and other issues of public interest. See <http://www.foodandwaterwatch.org/library>. FWW has a long history of analyzing federal government CAFO data, specifically, and making it available to the public. For example, FWW maintains and regularly updates a national Factory Farm Map using county-based USDA agricultural census data from across the nation. See [www.factoryfarmmap.org](http://www.factoryfarmmap.org). FWW is therefore prepared to analyze the information and present it to the public in a way that will most effectively increase public understanding of the subject.

FWW is also well-positioned to effectively disseminate the information obtained from the disclosed records such that it reaches a broad audience of interested members of the public through diverse and highly effective channels, including: traditional media outlets in California, Oregon, Washington, and nationally; FWW's website, Facebook page, other social media outlets, and newsletter; press releases; blog posts on websites such as the Huffington Post; presentations at community meetings and conferences attended by rural citizens impacted by CAFO pollution, environmental attorneys and advocates, and other interested members of the public; and emails to some or all of FWW's hundreds of thousands of supporters. FWW's work on CAFO pollution and EPA regulation of CAFOs has garnered significant media attention, including coverage in Politico, Inside EPA, Bloomberg, Greenwire, the Oregonian, and other state and local outlets across the country, demonstrating FWW's ability to reach interested members of the public with the requested information. Further, FWW is well-known to interested members of the public and to other organizations with interested members as a national leader on issues related to CAFO pollution, which facilitates FWW's dissemination of information to this audience.

FOTC prioritizes public education as a key component of its work, and routinely disseminates the information it obtains to the community through a variety of means. For example, FOTC has made numerous CAFO records that it obtained through FOIA available on its website for interested members of the public to easily access. See <http://www.friendsoftopenishcreek.org/index.html>. FOTC focuses on distributing information such as pollution data and health studies, so that the concerned citizens can become more informed about the public health risks due to pollution from industrial agricultural operations in the Lower Yakima Valley.

Puget Soundkeeper Alliance is frequently looked to by its members and supporters as an authority on facts related to water quality in Puget Sound, including CAFO pollution, in the broader context of water quality throughout Washington State. Without the requested records, Puget Soundkeeper will have only limited ability to accurately report a complete set of facts to individuals who contact it seeking information about EPA oversight of CAFO pollution. Puget Soundkeeper has a broad audience of members and supporters across the Puget Sound region, who share an interest in clean water, and protecting clean water for all – which lies at the root of the subject matter of this request. Members of the public who are interested in the subject of this request are very likely to go to Puget Soundkeeper for information about CAFOs and EPA action

to oversee CAFO pollution in Washington. Puget Soundkeeper is well-situated to disseminate the information to interested people; its staff includes policy advocates, outreach and education staff, and communications experts, its work is frequently featured in a wide range of media outlets (see <http://www.pugetsoundkeeper.org/media-coverage/>), the organization has mobilized 18,000 volunteers for its various activities, and it maintains a blog related to its agricultural and other work. Puget Soundkeeper has a genuine interest in ensuring that the information is shared in such ways as to contribute to the public understanding of a broad audience of persons interested in it, and a demonstrated ability to effectively do so.

Columbia Riverkeeper has expertise in reviewing and disseminating information prepared by agencies and ports in public records requests. A central focus of the organization is presenting this information to the public. In general, Columbia Riverkeeper presents information to the public through its website, newsletters, e-newsletters, public action alerts, public reports, media, and public presentations. For example, Columbia Riverkeeper regularly presents information on other Columbia River issues, including coal export and oil-by-rail proposals, and river protection at elementary and high schools, community colleges, public meetings, at Columbia Riverkeeper public events, and in front of government bodies. In turn, Columbia Riverkeeper's public records fee waiver request will benefit the general public: this information will be used to inform not only Columbia Riverkeeper's members, but interested members of the general public, which know that Columbia Riverkeeper is a leading organization in Oregon working on issues related to CAFO pollution and regulation of CAFOs. Columbia Riverkeeper's CAFO work has recently been featured in publications that reach a broad audience of interested persons, including the Oregonian, Oregon Public Broadcasting, and the East Oregonian. Columbia Riverkeeper intends to disseminate the information gleaned from the disclosed documents through an array of effective channels, including: its website, newsletter, presentations at public meetings and schools, through media releases, and in public reports.

EIP works to provide objective analysis of how the failure to enforce or implement environmental laws increases pollution and affects the public's health and welfare. Factory farm water and air pollution is one of EIP's focal issues and EIP has developed expertise on these issues. Because of its expertise in this area, EIP's staff of attorneys and researchers is well-prepared to analyze and evaluate the records received pursuant to this request, assess them in the context of the statutory mandates of the CWA and other laws, and evaluate whether EPA is exercising sufficient oversight of CAFOs and state CAFO programs in California, Oregon, and Washington. Like the other Requesters, EIP also has the "ability and intention to convey this information to the public." 40 C.F.R. § 2.107(l)(2)(iii). EIP has demonstrated its ability to provide plain-language analysis of these documents to citizens' organizations with an interest in EPA's actions and to members of the media. EIP frequently drafts and releases data-driven and policy-based reports that break down technical data and complex legal issues for the public and the press. See <http://www.environmentalintegrity.org/reports/>. EIP has garnered media coverage related to EPA's CAFO regulation that has reached a very broad audience of interested people – coverage includes agribusiness and farm journals, sustainable agriculture blogs, environmental publications, Greenwire, Bloomberg News, Inside EPA, Congressional Quarterly, and local and state newspapers and radio stations throughout the U.S. EIP also regularly makes presentations to community groups concerning CAFOs and generates press releases concerning CAFO regulation. EIP has also worked extensively on highlighting inadequate EPA oversight of state CAFO programs, joining petitions for de-delegation of the NPDES program in both Iowa and

Illinois, so it is well-prepared to disseminate similar information and interested members of the public. Like FWW and the other Requesters, interested members of the public know to look to EIP for information about CAFO pollution and EPA regulation and oversight of this pollution. EIP and its coalition partners have the ability and intention to similarly publicize information obtained through this FOIA request and inform a broad audience about the status of EPA's ongoing work related to CAFO pollution in these states.

AIR was formed to protect citizens from the harmful impacts of CAFO pollution, with a focus in California's Central Valley, and works to do so through litigation, organizing, and public advocacy. Their work to strengthen regulation of CAFO pollution has been featured in various publications, including the Fresno Bee and legal blogs. AIR frequently collaborates and shares information with other local, state, and national environmental organizations, and is capable of disseminating the information obtained in this FOIA to interested members of the public.

The Requesters will also make the information available to national, regional, state, and local organizations with members and supporters interested in the subject, such as Earthjustice, the Socially Responsible Agricultural Project, the Center for Food Safety, the Center for Biological Diversity, Public Justice, the Waterkeeper Alliance, the Humane Society of the United States, which cumulatively have millions of members nationwide and tens of thousands of members in California, Oregon, and Washington. Due to our large collective membership of citizens impacted by CAFOs and interested in this subject, our demonstrated ability to effectively analyze EPA records and disseminate information to the public directly and through the media, and our relationships with other organizations that can reach a broad audience of persons interested in the information in the requested records, the Requesters are uniquely able to contribute to "public understanding" and meet this fee waiver criterion.

*Factor 4: The disclosure is likely to contribute "significantly" to public understanding of EPA activities*

The Requesters also meet the fourth fee waiver criterion, because the public's understanding of EPA's operations or activities related to CAFOs in California, Oregon, and Washington "as compared to the level of public understanding existing prior to disclosure, [will] be enhanced by the disclosure to a significant extent." 40 C.F.R. § 2.107(l)(2)(iv). Because the Requesters, our coalition partners, and interested members of the public know little about EPA's recent oversight of California, Oregon, and Washington's NPDES and other CAFO programs or whether EPA has been effectively using its investigation, information collection, or enforcement authorities to protect water quality and public health from CAFO pollution in these states, the requested disclosures will undoubtedly increase public understanding of these subjects by a significant extent.

None of the records requested are currently available on EPA's website, elsewhere on the Internet, or have been previously published by EPA. Moreover, EPA recently decided not to finalize a national CAFO information collection process. This has prevented the creation of a national CAFO database and has limited the information about CAFOs, including those regulated under the NPDES program, that is readily available to the public. As a result, interested members of the public are currently largely in the dark regarding EPA's activities to oversee state CAFO programs and CAFO pollution. The requested records have significant informative

value, and transparency with regard to EPA's oversight of CAFOs and state CAFO regulatory programs is increasingly important in the wake of EPA's withdrawal of its proposed CAFO information collection rule. Disclosure of the requested records will provide the public with a comprehensive view of EPA's activities in Washington, Oregon, and California, enabling Requesters and the public to evaluate the consistency and effectiveness of EPA's activities and operations.

As discussed above, the Requesters have demonstrated their ability to significantly increase public understanding of CAFO issues, including through the use of federal CAFO records, in the past, and given the current lack of public access to the information sought in this request, will certainly do so again in this case. The Requesters are experienced at analyzing, synthesizing, and distilling voluminous and complex federal agency records and making them available and easily understandable to interested members of the public. In so doing, the Requesters are able to ensure that the increase in public understanding of EPA's CAFO oversight and enforcement in these states will be significant.

**Requirement 2: Disclosure is not primarily in the commercial interest of the Requesters**

*Factor 1: The Requesters have no commercial interest in obtaining the information*

The second element of the fee waiver analysis addresses the requester's "commercial interest" in the information. Two factors must be addressed when determining whether the information requested is "primarily in the commercial interest of the requester[s]." 40 C.F.R. § 2.107(l)(1). The first factor is whether the requester has a commercial interest that would be furthered by the requested disclosure. 40 C.F.R. § 2.107(l)(3)(i). Here, as nonprofit organizations, none of the Requesters have any commercial, trade, or profit interest in the material requested. The Requesters will not be paid for, or receive other commercial benefits from, the publication or dissemination of the material requested. The requested material will be disseminated solely for the purpose of informing and educating the public and will not be used for or result in commercial gain.

*Factor 2: Disclosure is not "primarily in the commercial interest of the requester[s]"*

The second factor of the commercial interest consideration hinges on the primary interest in the disclosure, and requires a weighing of any commercial interest against the public interest in disclosure. 40 C.F.R. § 2.107(l)(3)(ii). Clearly, there is great public interest in the release of the materials sought because they will allow the public to learn about and evaluate the adequacy of EPA's CAFO-related activities in California, Oregon, and Washington. Thus, even if the Requesters did have some "commercial" interest in the documents requested, a complete fee waiver would still be required because the Requesters' "primary" interest in the material is to inform the public about the operations and activities of the government. Therefore, this is a situation in which the "public interest is greater in magnitude than that of any identified commercial interest" of the requester. *Id.* Of course in this case, even if the public interest were not so significant, it would clearly outweigh the nonexistent commercial interest, such that the disclosure is clearly primarily in the public interest. Therefore, the "disclosure of the information . . . is not primarily in the commercial interest of" the Requesters and a fee waiver is appropriate. 5 U.S.C. § 552(a)(4)(A)(iii).



## Conclusion

Accordingly, based on the above analysis, the requested records bear directly on identifiable operations and activities of the EPA, will contribute significantly to a broad public understanding of the EPA's activities and operations regarding CAFOs in California, Oregon, and Washington, and will not serve any commercial interest on the part of the Requesters. Under these circumstances, the Requesters fully satisfy the criteria for a fee waiver. If for some reason EPA denies the fee waiver in whole or in part, please contact me before incurring any costs related to this request. If EPA does not fully grant the fee waiver and costs are incurred prior to contacting me, the Requesters will not be responsible for those costs. The Requesters reserve the right to appeal any decision to wholly or partially deny the fee waiver request in this matter.

If you have any questions or if you require further information to identify the requested records or rule on the fee waiver request, please contact me at (202) 683-2457 or [theinzen@fwwatch.org](mailto:theinzen@fwwatch.org). Additionally, if you are not the proper recipient of this request, please identify which office has information responsive to this request.

Thank you in advance for your prompt reply.

Sincerely,



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